REPORT OF THE FEDERAL TRADE COMMISSION ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES

REPORTING PERIOD JANUARY-JUNE 2011

The Federal Trade Commission ("Commission" or "FTC") is pleased to submit this report to the Congressional Appropriations Committees ("the Committees") in response to the Report of the Senate Committee on Appropriations on the Financial Services and General Government Appropriations Bill for Fiscal Year 2010. That Report expressed the Committee's concern "with the potential for market manipulation and anticompetitive behavior in the oil and natural gas industries," encouraged the FTC "to continue its investigations and other activities related to these concerns," and directed the agency "to keep the Committee apprised of findings made regarding fuel prices, as well as other planned activities and investigations regarding the oil and gas industries."[1]

Overview

The Commission's significant activities involving petroleum and natural gas during the first half of calendar 2011 demonstrate clearly that the FTC considers the protection of American consumers from potentially anticompetitive practices in the energy sector to be one of its major responsibilities. The Commission continued to pay close attention to the energy sector during this six-month period. The FTC and its staff focused on mergers and acquisitions, possible anticompetitive conduct, and other activities involving pricing or competition in the petroleum and natural gas industries. The Commission expects its vigorous activity to continue through the second half of 2011 and beyond.

Memorandum of Understanding with the CFTC

In April, the FTC and the Commodity Futures Trading Commission (CFTC) signed a Memorandum of Understanding (MOU) intended "to foster further cooperation between the two agencies by helping them share nonpublic information."[2] By facilitating the sharing of such information in investigations of oil and gasoline markets, the MOU is expected to help each

[1] Committee on Appropriations, United States Senate, Report 111-43, on the Financial Services and General Government Appropriations Bill, 2010, S. 1432, at 85 (July 9, 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:sr043.111.pdf. As the Commission noted in previous reports to the Appropriations Committees, because this is a public report, it is drafted to exclude sensitive details of ongoing investigations, which the Commission is prohibited by law from revealing.

[2] *See* http://www.ftc.gov/opa/2011/04/ftccftc-mou.shtm (press release); http://www.ftc.gov/os/2011/04/110412ftccftc-mou.pdf (text of the MOU).

agency carry out its authority to detect and prevent manipulation in those markets.

Law Enforcement Activities

The Commission's work in the oil and natural gas sector also involves the analysis of mergers and acquisitions. Since January 1, 2011, the Commission has received premerger filings under the Hart-Scott-Rodino Act for 48 proposed transactions in these industries. The agency reviewed each of these premerger filings, and also monitored the industry for nonreportable transactions that might raise antitrust concerns.

In May, the Commission announced a consent agreement arising from the acquisition by Irving Oil Ltd. and Irving Oil Terminals, Inc., of terminal and pipeline assets from ExxonMobil Corp. in the South Portland and Bangor/Penobscot Bay areas of Maine. The proposed consent order, which requires Irving to relinquish rights to certain terminal and pipeline assets, is intended to prevent the acquisition from leading to higher gasoline and diesel fuel prices for consumers.[3]

In addition, until the parties abandoned the transaction, the Commission investigated the proposed acquisition of the Oil Price Information Service, LLC, by The McGraw-Hill Companies, Inc. (the parent company of Platts). This acquisition involved competing providers of petroleum price gathering and reporting services.

The Commission also investigated other mergers and acquisitions that raised significant competition issues. These investigations involved refined petroleum product terminals and pipelines; gasoline retailing; liquefied petroleum gas (propane); natural gas liquids transportation, storage, and marketing; and natural gas gathering, processing, transportation, distribution, and retail sales. The Commission welcomed the cooperation of state attorney general offices in a number of these investigations.

The Commission's enforcement activities also included examinations of possibly anticompetitive conduct in the petroleum and natural gas industries. Crude oil and refined petroleum product prices and profit margins increased substantially earlier this year. The Energy Information Administration (EIA) has reported that U.S. refiners' refining margins had increased more than 90 percent between the beginning of 2011 and early May, while those refiners were using only 81.7 percent of their capacity in early May (a seven percent reduction from the same period in 2010). In light of these and other developments, the Commission recently opened an investigation – including authorization to use compulsory process – to determine whether certain oil producers, refiners, transporters, marketers, physical or financial traders, or others have engaged or are engaging in anticompetitive or manipulative practices or have provided any federal department or agency with false or misleading information related to the wholesale price of crude oil or petroleum products. The investigation will seek information that may include, but

[3] *See* http://www.ftc.gov/opa/2011/05/exxonirving.shtm.

is not limited to, utilization and maintenance decisions, inventory holding decisions, product supply decisions, product margins and profitability, and capital planning.

The FTC also has looked into other types of conduct by firms in the oil and natural gas industries, including inquiries related to propane and investigations of possibly anticompetitive or possibly deceptive conduct at various stages of the refined petroleum products business. Some inquiries concerning energy prices have involved close cooperation between the FTC staff and state attorney general offices. For example, the FTC staff evaluated concerns raised by one state attorney general concerning gasoline prices in a particular part of a state.

Petroleum Market Manipulation Rule

Pursuant to the process that the Commission established in November 2009 to monitor compliance with the Petroleum Market Manipulation Rule[4] – which prohibits manipulation in wholesale markets for crude oil, gasoline, or petroleum distillates – staff in the Bureau of Competition's Office of Policy and Coordination examined the four communications regarding the Rule received from the public since January 1, 2011.[5] Complaints that evidence a serious possibility of a Rule violation are referred to the FTC litigation units that specialize in maintaining competition in energy industries. Complaints that concern activity in futures markets are shared with the Commodity Futures Trading Commission (through the FTC's working relationship with that agency), to ensure that consumers are protected against fraud and deception in whatever form they take.[6]

Oil and Gas Price Fraud Working Group

The interagency cooperation typified by the FTC-CFTC MOU has assumed a broader form in light of this spring's increase in oil and gasoline prices. The Commission is continuing to assist the Oil and Gas Price Fraud Working Group, established by the Attorney General and composed of federal and state law enforcement agencies, to identify civil or criminal violations in the oil and gasoline markets and to ensure that American consumers are not harmed by any unlawful conduct.

[4] The Commission issued this Rule under the authority of Section 811 of the Energy Independence and Security Act of 2007, 42 U.S.C. § 17301.

[5] The "Guide to Complying with Petroleum Market Manipulation Regulations" that the Commission issued in November 2009 (http://www.ftc.gov/os/2009/11/091113mmrguide.pdf) provides addresses – including an email address – to which the public may send complaints of possible Rule violations.

[6] As described in more detail below, FTC litigators and economists also continue to monitor prices and other activity in petroleum markets.

Gasoline and Diesel Price Monitoring

During the relevant period, the FTC also continued a nearly decade-old project that has provided valuable information in connection with the agency's efforts to police conduct in the petroleum industry. Begun in 2002, the Gasoline and Diesel Price Monitoring Project involves monitoring by the Bureau of Economics of the wholesale and retail prices of gasoline and diesel fuel in order to help detect possible anticompetitive activities and determine whether a law enforcement investigation is warranted. This project continues to track retail gasoline and diesel prices in 360 cities across the nation and wholesale (terminal rack) prices in 20 major urban areas. The staff of the Bureau of Economics receives daily data from the Oil Price Information Service (except on Sundays) and reviews other relevant information that the Commission might receive directly from the public or from other government agencies or Members of Congress. The staff reviews the data and uses an econometric model to determine whether current retail and wholesale prices each week are anomalous in comparison with historical data. This alerts FTC staff to unusual changes in gasoline and diesel prices so that further inquiry can be undertaken expeditiously. When price increases do not appear to result from market-driven causes, the staff consults with the EIA. FTC staff also contacts the offices of the appropriate state attorneys general to discuss the anomaly and appropriate potential actions, including the opening of an investigation. The Commission expects to continue this important activity.

Assistance to Consumers

The Commission continued its program of issuing tips and alerts for energy consumers. In January, the agency issued "FTC Offers Tips on Making the Most of Your Auto Warranty," which included advice about keeping records of oil changes and about maintaining and maximizing the value of auto warranties.[7] In April, the Commission issued advice about saving gasoline as part of a broader set of consumer tips for Mother's Day.[8] The following month, the Commission issued "FTC Offers Tips to Stretch Your Gas Dollars."[9]

Congressionally Mandated Reports

A further FTC activity in this sector arose from Section 750 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203. FTC Chairman Leibowitz was a member of the Interagency Working Group for the Study on Oversight of Carbon Markets. This working group, led by the CFTC, conducted a study on the oversight of existing and prospective markets for the trading of allowances to emit carbon dioxide associated with the production and consumption of energy. Following publication of a Federal Register notice in

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[7] *See* http://www.ftc.gov/opa/2011/01/autowarranties.shtm.

[8] *See* http://www.ftc.gov/bcp/edu/multimedia/ecards/mom/2011/MothersDayTips.pdf.

[9] *See* http://www.ftc.gov/opa/2011/05/gassaving.shtm.

late 2010 calling for comment from the public and interested parties,[10] the working group transmitted its report to Congress on January 18, 2011. The report recommended a number of objectives to guide the oversight of carbon markets, including the protection of price discovery; appropriate levels of carbon market transparency; broad market participation; and the prevention of manipulation, fraud, and other market abuses.[11]

Economic Analysis of Oil and Gas Issues

Staff of the Commission's Bureau of Economics recently published an article in which they reported on a retrospective evaluation of two consummated transactions – Tosco's purchase of Unocal's West Coast refining and marketing assets in 1997 and UDS's purchase of Tosco's Avon refinery in 2000. Affecting the same area in Northern California, the first transaction increased area concentration, while the second transaction decreased concentration by roughly the same amount, thus affording an opportunity to test for a relationship between price and concentration. The authors analyzed gasoline prices at both the retail and wholesale levels and found no consistent relationship between changes in price and changes in concentration in the case of these two transactions.[12]

FTC Personnel Involved in Oil and Gas Activities

During the first half of 2011, personnel from many parts of the Commission continued their involvement in the agency's activities in the oil and natural gas industries. The Commission's Associate General Counsel for Energy engaged in virtually all aspects of the agency's work in these industries. Personnel from the Mergers III division of the Bureau of Competition (which is devoted primarily to petroleum and natural gas issues) and from a number of other Bureau divisions have been involved in addressing oil and natural gas issues as well.[13]

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[10] 75 Fed. Reg. 72816 (Nov. 26, 2010).

[11] *See* http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/dfstudy_carbon_011811.pdf (report); http://www.cftc.gov/PressRoom/PressReleases/pr5965-11.html (CFTC press release).

[12] Daniel Hosken, Louis Silvia, and Christopher Taylor, "Does Concentration Matter? Measurement of Petroleum Merger Price Effects," 101(3) Am. Econ. Rev.: Papers & Proceedings 45 (2011), *available at* http://www.aeaweb.org/articles.php?doi=10.1257/aer.101.3.45. As a paper produced by Bureau of Economics staff, this article does not necessarily represent the views of the Commission or of any individual Commissioner.

[13] Additional Bureau of Competition offices whose staff have participated in oil and gas matters during the first half of 2011 include the Office of the Director, the Division of Anticompetitive Practices, the Division of Compliance, the Office of Policy and Coordination, the Division of Technology and Information Management, the Division of Operations, and the

In addition to the Bureau of Competition, one division of the Commission's Bureau of Economics bore major responsibility for conducting competition analysis of pricing and other competitive issues in the petroleum and natural gas industries. Staff from the Commission's Office of the General Counsel, the Bureau of Consumer Protection, the Office of Congressional Relations, the Commissioners' offices, the FTC's Regional Offices, and other FTC organizations also contributed to oil and natural gas matters during the first six months of 2011.

Conclusion

The Commission has maintained its intensive antitrust and consumer protection scrutiny of the energy sector during the first half of 2011. In view of the fundamental importance of oil, natural gas, and other energy resources to the overall vitality of the United States and world economy, we expect that FTC review and oversight of the oil and natural gas industries will remain a centerpiece of our work for years to come.

Office of Premerger Notification.